UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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KELLY PATTERSON, Plaintiff(s), v. OFFICER RICHARD FONBUENA, Defendant(s).	Case No. 2:18-CV-518 JCM (GWF) ORDER

Presently before the court is defendant Officer Richard Fonbuena's ("Officer Fonbuena") motion for summary judgment. (ECF No. 32). Plaintiff Kelly Patterson ("Patterson") filed a response (ECF No. 36), to which Officer Fonbuena replied (ECF No. 40).

I. Facts

This action arises from Officer Fonbuena arresting Patterson allegedly for videotaping police activity. (ECF No. 15).

On November 5, 2016, Las Vegas Metropolitan Police Department ("LVMPD") officers responded to a call on Fremont Street whereby several females were involved in a physical altercation. (ECF No. 32 at 10). Upon breaking up the brawl, the officers attempted to arrest an African American female they believed to be the instigator. *Id.*; (ECF No. 34 at Exs. D, H). However, the female quickly became loud and combative, and three officers began to place her in handcuffs. *Id*. at D.

While the officers were effectuating the arrest, Patterson was walking on the sidewalk across the street and heard the female shout, "Don't touch me" and "Get your hands off me." (ECF Nos. 15 at 3, 32 at 11). Patterson remained fifteen feet away from the officers and began video-recording the incident with his phone. *Id.* Patterson claims that he was documenting the

arrest in his capacity as a reporter for CopBlock.org, which is a website intended to "inform the public of police misconduct." (ECF Nos. 15 at 2–3, 32 at 11, 15).

Officer Fonbuena noticed Patterson recording and hastily approached him, telling him to "move on." (ECF Nos. 32 at 12, 34 at Ex. H). Patterson responded that he was "not moving on." *Id.* Officer Fonbuena then asked Patterson if he wanted to go to jail for obstructing a police officer. *Id.* Patterson replied that he was "not obstructing anything." *Id.* After continuing to tell Patterson to "move on" and Patterson refusing to do so, Officer Fonbuena again asked Patterson if he wanted to go to jail, if he was an "idiot," and whether he lived in Las Vegas. (ECF Nos. 32 at 13–14, 34 at Exs. H).

Officer Fonbuena eventually grabbed Patterson's arm and forced him into the street. (ECF No. 34 at Exs. H, K). When Patterson pulled back from Officer Fonbuena's grip, Officer Fonbuena put his arm around Patterson's neck and shoulder, tossing him to the ground. *Id.* at Ex. K. Officer Fonbuena immediately got on top of Patterson while three other officers rushed over to put Patterson in handcuffs. *Id.* The officers successfully placed Patterson in custody and put him in the back of a patrol car. *Id.* at Exs. H, K, M. Officer Fonbuena cited Patterson for pedestrian interference and obstructing a police officer. (ECF No. 32 at 15–16).

On February 28, 2018, Patterson filed suit against Officer Fonbuena and Las Vegas Metropolitan Police Department ("LVMPD") in state court. (ECF No. 3 at 1). LVMPD and Officer Fonbuena removed the case to federal court on March 21, 2018. *Id.* at 4. On May 1, 2018, the court dismissed LVMPD as a defendant and granted Patterson leave to amend his complaint. (ECF No. 14). In his amended complaint, Patterson alleges that Officer Fonbuena's conduct violated his First, Fourth, Fifth Amendment rights. (ECF No. 15). Specifically, Patterson asserts four claims: (1) First Amendment retaliation; (2) arrest without probable cause in violation of the Fourth Amendment; (3) use of excessive force in violation of the Fourth Amendment; and (4) violation of procedural due process under the Fourteenth Amendment. *Id.* Now, Officer Fonbuena moves for summary judgment on all causes of action. (ECF No. 32).

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II. Legal Standard

The Federal Rules of Civil Procedure allow summary judgment when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that "there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). A principal purpose of summary judgment is "to isolate and dispose of factually unsupported claims." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

For purposes of summary judgment, disputed factual issues should be construed in favor of the non-moving party. *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 888 (1990). However, to be entitled to a denial of summary judgment, the nonmoving party must "set forth specific facts showing that there is a genuine issue for trial." *Id.*

In determining summary judgment, a court applies a burden-shifting analysis. The moving party must first satisfy its initial burden. "When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case." *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted).

By contrast, when the nonmoving party bears the burden of proving the claim or defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential element of the non-moving party's case; or (2) by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to that party's case on which that party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–24. If the moving party fails to meet its initial burden, the court must deny summary judgment and it need not consider the nonmoving party's evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–60 (1970).

If the moving party satisfies its initial burden, the burden then shifts to the opposing party to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith*

Radio Corp., 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 631 (9th Cir. 1987).

In other words, the nonmoving party cannot avoid summary judgment by relying solely on conclusory allegations that are unsupported by factual data. *See Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and allegations of the pleadings and set forth specific facts by producing competent evidence that shows a genuine issue for trial. *See Celotex*, 477 U.S. at 324.

At summary judgment, a court's function is not to weigh the evidence and determine the truth, but to determine whether there is a genuine issue for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The evidence of the nonmovant is "to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255. But if the evidence of the nonmoving party is merely colorable or is not significantly probative, summary judgment may be granted. *See id.* at 249–50.

III. Discussion

Officer Fonbuena argues that he is "entitled to qualified immunity [on the First and Fourth Amendment claims] because his decision to impose a distance restriction was not 'beyond debate' wrong." (ECF No. 32 at 22). However, Patterson contends that a genuine issue of material fact exists as to whether Officer Fonbuena violated Patterson's constitutional rights and thus qualified immunity is unavailable to him. (ECF No. 36 at 6). Moreover, Officer Fonbuena argues that Patterson's Fifth Amendment claim is not legally cognizable and thus the court must dismiss it. (ECF No. 32 at 32). The court addresses each of Officer Fonbuena's contentions individually.

In determining whether officers are entitled to qualified immunity the court takes the facts in the light most favorable to the nonmoving party and considers whether "(1) the facts show that the officer's conduct violated a constitutional right; and (2) if so, whether that right

was clearly established at the time." *Rider v. Tristan*, No. 2:16-cv-02633-RFB-PAL, 2019 WL 652997 at *3 (D. Nev. Feb. 15, 2019); *see also Saucier v. Katz*, 533 U.S. 194, 201 (2001); *Tarabochia*, 766 F.3d 1115, 1121 (9th Cir. 2014).

a. First Amendment

Officer Fonbuena argues that the court should find that he is entitled to qualified immunity on Patterson's First Amendment claim. (ECF No. 32 at 22). The court now analyzes both prongs of qualified immunity in turn.

i. Constitutional violation

"In order to state a claim for a First Amendment violation, a plaintiff must allege (1) that he was engaged in a constitutionally protected activity; (2) that the [officer's] actions would chill a person of ordinary firmness from continuing to engage in that activity[;] and (3) that the protected activity was a substantial or motivating factor in the [officer's] conduct." *Adkins v. Limtiaco*, 537 Fed. App'x 721, 722 (9th Cir. 2013) (citing *Mendocino Envtl. Ctr. v. Mendocino Cnty.*, 192 F.3d 1283, 1300–01 (9th Cir. 1999)).

As a threshold matter, the parties do not dispute that Patterson's conduct—filming a police officer on public property—meets the first requirement of the analysis. *See generally* (ECF Nos. 32, 36, 40). The Ninth Circuit has firmly established the right to film matters of public concern, including police activity. *See Fordyce v. City of Seattle*, 55 F.3d 436, 438–39, 442 (9th Cir. 1995) (recognizing the First Amendment right to film matters of public interest); *see also Limtiaco*, 537 Fed. App'x at 722 (finding that plaintiff's constitutional right to photograph a public scene was clearly established at the time of the 2009 arrest) (citation omitted).

Furthermore, Officer Fonbuena testified that he ordered Patterson to "move on," and after counting down from "four, three, two, one," Officer Fonbuena arrested Patterson for disobeying orders. (ECF No. 36 at 9). The Ninth Circuit has held that "retaliatory police action such as an arrest or search and seizure would chill a person of ordinary firmness from engaging in future First Amendment activity." *Ford v. City of Yakima*, 706 F.3d 1188, 1193 (9th Cir. 2013). Thus,

when Officer Fonbuena arrested Patterson, he engaged in acts that deter the exercise of First Amendment rights.

Additionally, the court finds factual disputes regarding whether Patterson's filming was a substantial or motivating factor in Officer Fonbuena's decision to arrest Patterson. *See* (ECF Nos. 32, 36, 40). Officer Fonbuena argues that he arrested Patterson for pedestrian interference and obstructing a police officer. (ECF No. 40 at 9). However, Patterson avers that his filming of the police activity was a substantial and motivating factor in his arrest. (ECF No. 36 at 8). Patterson seeks to corroborate this argument with Officer Fonbuena's testimony wherein Officer Fonbuena admitted that (1) he was only paying attention to Patterson because Patterson was recording; (2) he arrested Patterson because Patterson resisted the order to "move on" and was still recording; and (3) he would not have arrested Patterson if Patterson ceased recording. *Id*. at 8–9.

The court concludes that Officer Fonbuena's testimony, as well as the video recording and police officers' body camera footage, constitute sufficient evidence on which a reasonable jury could find that Officer Fonbuena acted with a retaliatory motive. *See* (ECF Nos. 32, 34 at Exs. H, K, 36, 40). Thus, Officer Fonbuena has not shown that he did not violate a constitutional right.

ii. Clearly established right

Having determined that questions of material fact remain, the court must now decide whether it should nevertheless grant summary judgment because there is no clearly established right. *See Saucier*, 533 U.S. at 201.

The relevant inquiry is whether a reasonable officer in Officer Fonbuena's position would believe that arresting Patterson for filming the police was lawful in light of clearly established law. *See Saucier*, 533 U.S. at 201; *Tarabochia*, 766 F.3d at 1125 (internal quotations omitted); *Torres v. City of Los Angeles*, 548 F.3d 1197, 1210 (9th Cir. 2008) (explaining that "defendants are only entitled to qualified immunity as a matter of law if, taking the facts in the light most favorable to [the plaintiff], they violated no clearly established constitutional right").

Under the second prong, courts "consider whether a reasonable officer would have had fair notice that the action was unlawful." *Tarabochia*, 766 F.3d at 1125 (internal quotations omitted). Moreover, while a case directly on point is not a requirement for the law to clearly establish a right, "existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (internal quotations omitted); *see also Plumhoff v. Rickard*, 572 U.S. 765, 778–89, 134 S.Ct. 2012 (2014); *Injeyan v. City of Laguna Beach*, 645 F. App'x 577, 579 (9th Cir. 2016). This ensures that the law has given officials "fair warning that their conduct is unconstitutional." *Ellins v. City of Sierra Madre*, 710 F.3d 1049, 1064 (9th Cir. 2013) (citation omitted).

Filming, photographing, or recording matters of public interest, including police conduct, are clearly established constitutional rights. *See Fordyce*, 55 F.3d at 438–39, 442 (recognizing the First Amendment right to film matters of public interest); *see also Limtiaco*, 537 Fed. App'x at 722. The Ninth Circuit also established that there is a right to be free from retaliation even if a non-retaliatory justification exists for the officer's actions. *See e.g., Skoog v. Cty. Of Clackamas*, 469 F.3d 1221, 1235 (9th Cir. 2006); *see also O'Brien v. Welty*, 818 F.3d 920, 936 (9th Cir. 2016). Thus, "a reasonable officer would have known that he cannot retaliate against a citizen for recording the police in a public place, even if the officer was also acting to protect the safety of officers or to arrest [the individual] based on probable cause." *Redmond v. San Jose Police Dept.*, No. 14-cv-02345-BLF, 2017 WL 5495977 at *11 (N.D. Cal. Nov. 16, 2017).

iii. Conclusion

Where, as here, a reasonable jury could find that Officer Fonbuena violated Patterson's First Amendment right, and the law clearly established that right at the time of the arrest, the case should proceed to trial. Thus, Officer Fonbuena is not entitled to qualified immunity on the First Amendment claim. The court also cannot grant summary judgment on the merits due to a genuine issue of material fact.[1]

[1] Regarding Patterson's constitutional right to film the police, Officer Fonbuena argues that the right is subject to reasonable time, place, and manner restrictions. (ECF No. 32 at 20). Officer Fonbuena is correct that the government may impose a reasonable time, place, and manner restriction on expressive activity in a public forum. *Reed v. Lieurance*, 863 F.3d 1196, 1211 (9th Cir. 2017) (citing *Kuba v. 1-A Agric. Ass'n*, 387 F.3d 850, 858 (9th Cir. 2004).

b. Fourth Amendment

Patterson argues that (1) Officer Fonbuena did not have probable cause to arrest him; and (2) Officer Fonbuena used excessive force when unlawfully arresting him. (ECF No. 15). However, Officer Fonbuena disputes these allegations and maintains that even if he violated Patterson's Fourth Amendment rights, he is entitled to qualified immunity on both claims. (ECF No. 32). The court addresses each claim in turn.

i. Probable cause

Officer Fonbuena contends that he is entitled to qualified immunity on the Fourth Amendment claim because he had probable cause to arrest Patterson for refusing to obey his order to "move on." (ECF No. 32 at 28). The court addresses each prong of qualified immunity to determine whether Officer Fonbuena is entitled to judgment as a matter of law.

1. Constitutional violation

Probable cause to arrest exists when, "under the totality of the circumstances known to the arresting officers, a prudent person would have concluded that there was a fair probability that [the suspect] had committed a crime." *United States v. Smith*, 790 F.2d 789, 792 (9th Cir. 1986) (internal citations omitted). If an officer makes an arrest without probable cause, the officer may nonetheless be entitled to qualified immunity if he reasonably believed there to have been probable cause. *See Ramirez v. City of Buena Park*, 560 F.3d 1012, 1024 (9th Cir. 2009).

"Probable cause is generally a question for the jury," and the court can decide it as a matter of law only if "no reasonable jury could determine that there was a lack of probable cause." *Barry v. Fowler*, 902 F.2d 770, 772 (9th Cir. 1990) (citing *McKenzie v. Lamb*, 738 F.2d 1005, 1007 (9th Cir. 1984)). It is, moreover, a wholly objective standard—the arresting officer's subjective intent or motivation is irrelevant. *See e.g., Whren v. United States*, 517 U.S. 806, 813 (1996).

However, time, place, and manner restrictions apply to policies that police departments implement, not individual orders that officers give without a policy in place. *See e.g., Turner v. Lietenant Driver*, 848 F.3d 678, 690 (5th Cir. 2017); *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011). Here, there is no evidence in the record of a policy that Officer Fonbuena was enforcing in his alleged attempt to restrict Patterson's First Amendment activity. *See* (ECF Nos. 32, 36, 40). Thus, since both parties discuss the time, place, and manner restriction in generalities without ever identifying a policy, the court does not address this issue.

Officer Fonbuena arrested and charged Patterson for pedestrian interference and obstructing a police officer. (ECF No. 32 at 15–16). Officer Fonbuena argues that he had probable cause to arrest Patterson when he refused to "move on." *Id.* at 26–29. However, the court finds this argument unavailing because there is a genuine dispute as to whether Patterson was obstructing police activity when he was recording the officers from fifteen feet away. (ECF No. 34 at Exs. D, E, H, K). Indeed, a reasonable jury could find that Patterson's acts would not give a reasonable officer probable cause to arrest him. *See generally Whren*, 517 U.S. 806. Therefore, the court finds that an issue of material fact exists as to whether Officer Fonbuena violated Patterson's constitutional right to be free from unlawful arrest.

2. Clearly established right

Having decided that there is a triable issue as to whether Officer Fonbuena had probable cause to arrest Patterson, the court must next determine whether Office Fonbuena is nonetheless entitled to summary judgment because no clearly established right exists. *See Saucier*, 533 U.S. at 201.

It is clearly established that a law enforcement officer cannot arrest an individual without probable cause. *Rosenbaum v. Washoe County*, 663 F.3d 1071, 1076 (9th Cir. 2011) ("It is well established that an arrest without probable cause violates the Fourth Amendment") (internal quotations omitted). This right applies to all offenses, including Patterson's alleged violations of NRS 197.190 and Las Vegas Municipal Code § 10.47.020. *See generally Rosenbaum*, 663 F.3d at 1076; (ECF Nos. 32, 36, 40).

3. Conclusion

Because a reasonable jury could find that Officer Fonbuena violated Patterson's Fourth Amendment right, and the law clearly established that right at the time of the arrest, the case should proceed to trial. Thus, Officer Fonbuena is not entitled to qualified immunity on this Fourth Amendment claim. Moreover, the court cannot grant summary judgment on the merits because it finds that there is a genuine issue of material fact.

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ii. Excessive force

Officer Fonbuena maintains that he is entitled to qualified immunity for the excessive force claim. (ECF No. 32 at 29). The court disagrees.

1. Constitutional violation

Turning to the first prong of qualified immunity, at summary judgment Officer Fonbuena must show that no reasonable trier of fact could find that his use of force violated Patterson's Fourth Amendment rights. *See Saucier*, 533 U.S. at 201.

Courts analyze excessive force claims under the *Graham* framework. *Id.* Thus, the court considers (1) how severe the crime at issue is; (2) whether the suspect posed an immediate threat to the safety of the officers or others; and (3) whether the suspect was actively resisting arrest or attempting to evade arrest by flight. *Id.* at 396; *see also Bryan v. MacPherson*, 630 F.3d 805, 826 (9th Cir. 2010). These factors are not exclusive and are "simply a means by which to determine objectively 'the amount of force that is necessary in a particular situation.'" *Deorle v. Rutherford*, 272 F.3d 1272, 1280 (9th Cir. 2001).

In other words, the court examines the totality of the circumstances and considers "whatever specific factors may be appropriate in a particular case, whether or not listed in *Graham*." *Franklin v. Foxworth*, 31 F.3d 873, 876 (9th Cir. 1994). The totality of the circumstances here suggests that there is no justification for Officer Fonbuena's use of force against Patterson.

As to the first factor, Officer Fonbuena took Patterson to the ground where he and three other officers placed Patterson in handcuffs for recording the ensuing arrest. (ECF No. 32 at 14, 36 at 20). Patterson did not obstruct or threaten the officers or anyone else, nor did he interfere with the officers' arrest or investigation. (ECF No. 36 at 20). Moreover, Patterson was not actively attempting to flee, and it is disputed whether Patterson was actively resisting arrest. *Id.* Therefore, a reasonable jury could find that Patterson committed no crime and thus any force Officer Fonbuena used against Patterson would be excessive.

Even assuming that Patterson committed a crime, obstructing a police officer is a misdemeanor. *Mitchell v. City of Henderson, Nevada*, No. 2:13-cv-01154-APG-CWH, 2017 WL

2841327 at *9 (D. Nev. July 3, 2017); Nev. Rev. Stat. 197.190. A misdemeanor is not a severe crime and thus this factor weighs in favor of a constitutional violation.

The "most important" factor is whether the suspect posed an "immediate threat to the safety of the officers or others." *City of Hemet*, 394 F.3d at 702 (citation omitted). "A simple statement by an officer that he fears for his safety or the safety of others is not enough; there must be objective factors to justify such a concern." *Deorle*, 272 F.3d at 1281. Without pointing to specific evidence in the record, Officer Fonbuena argues that Patterson was too close to the other officers and refused to obey Officer Fonbuena's order to "move on." (ECF No. 32 at 11, 13). However, the court finds that there is a genuine dispute as to whether Patterson posed an immediate threat, if any, to the safety of the officers or patrons. *See* (ECF Nos. 32, 34 at Exs. D, E, H, K, 36, 40). Thus, the court cannot determine whether this factor weighs against a constitutional violation.

Under the third factor, there is no evidence that Patterson attempted to flee. (ECF Nos. 32, 34 at Exs. D, E, H, K, 36, 40). However, it is unclear whether Patterson was actively resisting arrest. *Id*. After repeatedly ordering Patterson to "move on" and Patterson refusing to do so, Officer Fonbuena grabbed Patterson's arm, forcing Patterson off the sidewalk. (ECF No. 34 at Exs. H, K). Patterson reacted by pulling back, which resulted in Officer Fonbuena putting his arm around Patterson's neck and shoulder, tossing him to the ground. *Id*. Officer Fonbuena instantly got on top of Patterson, while three other officers rushed over to place Patterson in handcuffs. *Id*. The dispute lies in whether Officer Fonbuena's action of grabbing Patterson's arm was an attempt to arrest him. *See generally* (ECF Nos. 32, 34 at Exs. E, H, K, 36, 40).

The Ninth Circuit has stated that most definitions of "arrest" require restraint, seizure, or detention. *United States v. Leal-Felix*, 625 F.3d 1148, 1160 (9th Cir. 2010). While it is certain that Officer Fonbuena arrested Patterson, the court cannot determine at what point Officer Fonbuena's conduct constituted an arrest. *See generally* (ECF No. 34 at Exs. H, K). A reasonable jury could either find that Officer Fonbuena grabbed Patterson's arm as an attempt to stop Patterson from recording or as an attempt to arrest him. Whichever the case may be, this issue is one that a finder-of-fact should determine.

In sum, triable issues of fact exist as to the second and third factors. Thus, it is up to a reasonable jury to decide whether Officer Fonbuena violated Patterson's Fourth Amendment rights by using unconstitutionally excessive force.

2. Clearly established right

As for the "clearly established" prong of the qualified immunity analysis, it is well-established that a law enforcement officer must use force that is proportionate to the level of threat that a suspect creates. *Jones v. Las Vegas Metro. Police Dep't.*, 873 F.3d 1123, 1131–32 (9th Cir. 2017).

Long before 2016, *Graham*, *Blackenhorn*, and *Young* made clear to a reasonable officer that using substantial force against a suspect who did not commit a serious crime, did not pose a threat, and did not resist arrest or attempt to flee is objectively unreasonable under the Fourth Amendment. *See Graham*, 490 U.S. at 393; *Blackenhorn v. City of Orange*, 485 F.3d 463 (9th Cir. 2007); *Young v. County of Los Angeles*, 655 F.3d 1156, 1167–68 (9th Cir. 2011) (holding that "it is rarely necessary, if ever, for a police officer to employ substantial force without warning against an individual who is suspected only of minor offenses, is not resisting arrest, and, most important, does not pose any apparent threat to officer[s] or public safety.").

As the court previously noted, obstructing a police officer is a misdemeanor. *Mitchell*, 2017 WL 2841327 at *9; Nev. Rev. Stat. 197.190. A reasonable officer would have known that the Fourth Amendment does not allow an officer to violently place into custody a suspect who is obstructing police activity while posing no threat to anyone's safety. *See Robinson v. Solano County*, 278 F.3d 1007, 1014 (9th Cir. 2002); *Young*, 655 F.3d at 1168; *Mitchel*, 2017 WL 2841327 at *9.

3. Conclusion

The court concludes that a reasonable jury could find that Officer Fonbuena violated Patterson's Fourth Amendment right, and the law clearly established that right at the time of the arrest. Thus, the case should proceed to trial.

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c. Fifth and Fourteenth Amendment

Patterson alleges that Officer Fonbuena denied Patterson his right to be free from any deprivation of liberty without due process of law under the Fifth and Fourteenth Amendments. (ECF Nos. 15 at 6, 32 at 32). Officer Fonbuena avers that this claim is not legally cognizable and thus the court must dismiss it. (ECF No. 32 at 32). The court disagrees.

"The Due Process Clause of the Fifth Amendment and the equal protection component thereof apply only to actions of the federal government—not to those of state or local governments." *Lee v. City of Los Angeles*, 250 F.3d 668, 687 (9th Cir. 2001) (citing *Schweiker v. Wilson*, 450 U.S. 221, 227 (1981)). However, Patterson alleges that Officer Fonbuena violated his due process rights through the Fifth and Fourteenth Amendments. (ECF No. 15 at 6). The Supreme Court has held that the Fifth Amendment applies to the states through incorporation of the Fourteenth Amendment. *See Malloy v. Hogan*, 378 U.S. 1, 6, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964); *see also Vogt v. City of Hays, Kansas*, 844 F.3d 1235, 1253 n. 1 (10th Cir. 2017) (citing *Hogan*, 378 U.S. at 6). Thus, Patterson's due process claim is legally cognizable and applies to state actors, such as Officer Fonbuena. *See id*. The court therefore does not dismiss this claim.

IV. Conclusion

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that Officer Fonbuena's motion for summary judgment (ECF No. 32) be, and the same hereby is, DENIED, consistent with the foregoing.

DATED August 2, 2019.

James C. Mahan

UNITED STATES DISTRICT JUDGE

James C. Mahan
U.S. District Judge